THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JENNIFER FIELDS,
Grievant,

v. **Docket No. 2013-1130-MinED**

MINGO COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Jennifer Fields, is employed by Respondent, Mingo County Board of Education. On February 3, 2013, Grievant filed this grievance against Respondent stating, "I think + feel I was done wrong by getting RIF[1] from a secure job that I was told I was safe at." For relief, Grievant seeks reinstatement and compensation for lost wages and benefits with interest.

Following the April 23, 2013 level one conference, a level one decision was rendered on May 13, 2013, denying the grievance. Grievant appealed to level two on May 27, 2013. Grievant perfected the appeal to level three of the grievance process on August 26, 2013. A level three hearing was held on November 21, 2013, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant was represented by counsel, John Everett Roush, West Virginia School Service Personel Association. Respondent was represented by counsel, Rebecca M. Tinder, Bowles Rice McDavid Graff & Love LLP. This matter became mature for decision on December 23, 2013, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

[1] As used herein, "RIF" refers to "reduction in force" as the term is used in West Virginia Code § 18A-4-8b, when a school board reduces the number of personnel within a particular job classification.

Synopsis

Grievant's probationary contract was not renewed pursuant to a reduction in force. Grievant asserted that Respondent was required to renew her contract because the director of human resources had assured Grievant her position was secure or that Respondent should have chosen to assign positions differently when it merged two schools. Grievant was one of the least senior employees in her job classification. Respondent would not have been bound by any assurance by the director of human resources, which would have been *ultra vires*, as the law requires reduction in force be based on seniority. Grievant failed to prove by a preponderance of the evidence that Respondent's decision not to renew Grievant's probationary contract was arbitrary and capricious. Accordingly, the grievance is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant was employed by Respondent as a half-time cook at Matewan Elementary School under a probationary contract during the 2012 – 2013 school year.

2. For the 2013 – 2014 school year, Respondent determined there would need to be a reduction in force of ten cooks. The reduction in force was partly due to the merger of four schools. Matewan Elementary School, where Grievant was stationed, would be merged with Matewan Middle School, creating Matewan PK – 8, and be housed at the former Matewan Elementary School.

3. At the time of the reduction in force decision, Grievant had less than one year of seniority as a Cook, and was fourth from the bottom in seniority among forty-one cooks.

4. On March 25, 2013, Grievant was notified by letter that she would not be rehired for the 2013 – 2014 school year pursuant to West Virginia Code § 18A-2-8a.

5. Sometime during the school year, which might have been after Grievant had received this notice, the director of human resources told Grievant that Grievant was "in a safe, secure job."

6. The director of human resources also had a conversation with another employee, in which she discussed that a position at Matewan Elementary was generally more secure than one at Matewan Middle, since it was already known that Matewan Middle would be closed so that all positions at Matewan Middle would be eliminated. Grievant received secondhand accounts of this conversation.

7. Matewan Elementary School and Matewan Middle School had a combined total of four full-time and two half-time cooks. Matewan PK – 8 would have three full-time cooks.

8. The new full-time cook position for Matewan PK – 8 was posted and was awarded to the most senior applicant, who had seven years more seniority than Grievant.

9. Grievant was placed on the preferred recall list, and served as a substitute Cook during the first half of the 2013 – 2014 school year.

10. Grievant was scheduled to return to regular employment with Respondent in December 2013.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2008); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ*., Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. Of Educ*., Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant argues that she was led to believe her position was “safe” by Respondent’s director of human resources, so therefore, Respondent was required to renew Grievant’s contract. Grievant argues that Respondent should have filled the third Cook position at the new school with two half-time positions. Grievant does not allege that Respondent failed to comply with the notice and hearing requirements of West Virginia Code § 18A-2-8a, or that Respondent made a mistake in calculating Grievant’s seniority under West Virginia Code § 18A-4-8b. Respondent asserts that its decision not to renew Grievant’s probationary contract was proper, and that Grievant was given no assurance that her position would not be reduced in force[2].

[2] Although Respondent denies in its Proposed Findings of Fact and Conclusions of Law that the director of human resources made any comments about job security to Grievant, a review of the level three testimony shows that the director of human resources did not testify about any conversations with Grievant she may have had.

"West Virginia Code § 18A-2-8a gives broad discretion to the county board when determining whether or not to rehire a probationary employee, and to prove his case, Grievant must establish the board's decision to not renew his contract was arbitrary and capricious." *Mellow v. Jefferson County Bd. of Educ.*, Docket No. 2010-1397-JefED (Oct. 8, 2010) (citing *Beheler v. Logan County Bd. of Educ.*, Docket No. 98-23-276 (Dec. 11, 1998); *See Miller v. Bd. of Educ.*, 190 W. Va. 153, 437 S.E.2d 591 (1993); *Pockl v. Ohio County Bd. of Educ*., 185 W. Va. 256, 406 S.E.2d 687 (1991); *Rogers v. Logan County Bd. of Educ.*, Docket Nos. 99-23-196/246 (Nov. 16, 2002)). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604 at 614, 474 S.E.2d 534 at 544 (1996). (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

Grievant does not allege that Respondent's nonrenewal of her contract violated the procedural requirements of West Virginia Code §§ 18A-2-8a or 18A-4-8b, which are the governing code sections in this case. There being no procedural deficiency, Grievant must prove by a preponderance of the evidence that Respondent's decision to reduce in force was arbitrary and capricious. Grievant testified that the director of human resources had told her that Grievant was "in a safe, secure job." However, in Grievant's further testimony she testified she was not sure when this conversation had happened, other than during the school year. She could not even testify for certain whether the conversation took place before or after Grievant had been notified she would be reduced in force. In fact, one of Grievant's witnesses, Lisa Napier, testified that this conversation took place after the reduction in force. Grievant offered no other

testimony about the specifics of the conversation she alleges she had with the director of human resources. However, the director of human resources neither confirmed nor denied in her testimony whether such a conversation had taken place. Grievant and other witnesses also testified about secondhand accounts of statements the director of human resources supposedly said to other employees. The director of human resources clarified that when she spoke to other employees about the security of a position at Matewan Elementary as opposed to Matewan Middle, she was referring to the fact that the decision to close Matewan Middle had already been made, so that any position at Matewan Middle would assuredly be terminated. These conversations in no way create a reasonable expectation on Grievant's part that her contract would be renewed. Even if Grievant was told by the director of human resources that Grievant was "in a safe, secure job," Grievant cites no legal support for the proposition that the alleged statements by the director of human resources would prevent Respondent from not renewing Grievant's contract, stating only that Respondent is "morally bound."

On the contrary, even if the director of human resources had specifically promised Grievant her contract would be renewed, the grievance could still not be granted on that ground as such an act would be *ultra vires*. "This Grievance Board has discussed the issue of *ultra vires* acts at some length. *Ultra vires* acts of a governmental agent, acting in an official capacity, in violation of a policy or statute, are considered non-binding and cannot be used to force an agency to repeat such violative acts. *Guthrie v. Dep't of Health and Human Serv.*, Docket No. 95-HHR-297 (Jan. 31, 1996). *See Parker v. Summers County Bd. of Educ.*, 185 W. Va. 313,406 S.E.2d 744 (1991); *Franz v. Dep't of Health and Human Res*., Docket No. 99-HHR-228 (Nov. 30,

1998). The rule is clear. The state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers, and all persons must take note of the legal limitations upon their power and authority. *Syl. Pt. 2, W. Va. Pub. Employees Ins. Bd. v. Blue Cross Hosp. Serv., Inc*., 174 W. Va. 605, 328 S.E.2d 356 (1985); *Allen v. Dep't. of Transp. and Division of Personnel*, Docket No. 06-DOH-242 (January 31, 2007)." *Buckland v. Division of Natural Res.,* Docket No. 2008-0095-DOC (Oct. 6, 2008). Retaining Grievant over other more senior employees would have been in clear violation of West Virginia Code § 18A-4-8b, which requires that reduction in force be based on seniority, with the least senior employees in a particular job classification being released. WEST VIRGINIA CODE § 18A-4-8b(h). Even if the director of human resources had made any promises to Grievant, such a promise would not have been legally authorized, and would not be binding.

Grievant further argues Respondent could have chosen to fill the third Cook position at the new school with two half-time positions, although Grievant offers no argument, other than the retention of herself in that position, for why Respondent should have done so. Respondent had decided that the merged school should have three full-time cooks, and Respondent's decision is reasonable. Grievant failed to prove that Respondent's decision to fill the third Cook position with a full-time position rather than two half-time positions was in any way arbitrary and capricious.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. W. VA. CODE ST.

R. § 156-1-3 (2008); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. Logan County Bd. of Educ*., Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. Of Educ*., Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. "West Virginia Code § 18A-2-8a gives broad discretion to the county board when determining whether or not to rehire a probationary employee, and to prove his case, Grievant must establish the board's decision to not renew his contract was arbitrary and capricious." *Mellow v. Jefferson County Bd. of Educ.*, Docket No. 2010-1397-JefED (Oct. 8, 2010) (citing *Beheler v. Logan County Bd. of Educ.*, Docket No. 98-23-276 (Dec. 11, 1998); *See Miller v. Bd. of Educ.*, 190 W. Va. 153, 437 S.E.2d 591 (1993); *Pockl v. Ohio County Bd. of Educ*., 185 W. Va. 256, 406 S.E.2d 687 (1991); *Rogers v. Logan County Bd. of Educ.*, Docket Nos. 99-23-196/246 (Nov. 16, 2002)). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604 at 614, 474 S.E.2d 534 at 544 (1996). (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

3. "This Grievance Board has discussed the issue of *ultra vires* acts at some length. *Ultra vires* acts of a governmental agent, acting in an official capacity, in violation of a policy or statute, are considered non-binding and cannot be used to force an agency to repeat such violative acts. *Guthrie v. Dep't of Health and Human Serv.*,

Docket No. 95-HHR-297 (Jan. 31, 1996). *See Parker v. Summers County Bd. of Educ.*, 185 W. Va. 313,406 S.E.2d 744 (1991); *Franz v. Dep't of Health and Human Res*., Docket No. 99-HHR-228 (Nov. 30, 1998). The rule is clear. The state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers, and all persons must take note of the legal limitations upon their power and authority. *Syl. Pt. 2, W. Va. Pub. Employees Ins. Bd. v. Blue Cross Hosp. Serv., Inc*., 174 W. Va. 605, 328 S.E.2d 356 (1985); *Allen v. Dep't. of Transp. and Division of Personnel*, Docket No. 06-DOH-242 (January 31, 2007)." *Buckland v. Division of Natural Res.,* Docket No. 2008-0095-DOC (Oct. 6, 2008).

4. "All decisions by county boards concerning reduction in work force of service personnel shall be made on the basis of seniority. . . ." WEST VIRGINIA CODE § 18A-4-8b(h).

5. Any assurance the director of human resources may have made to Grievant that her position was secure was not binding because such an assurance would have been in violation of West Virginia Code § 18A-4-8b.

6. Grievant failed to prove by a preponderance of the evidence that Respondent's decision not to renew Grievant's probationary contract was arbitrary and capricious.

Accordingly, the grievance is **DENIED.**

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. Va. Code § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any

of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* W. VA. CODE ST. R. § 156-1-6.20 (2008).

DATE: February 4, 2014

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Billie Thacker Catlett
Administrative Law Judge